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THE WORLD HEALTH ORGANIZATION'S RESOLUTION CONDEMNING AIDS-RELATED DISCRIMINATION AND ONGOING UNITED STATES NONCOMPLIANCE AT THE BORDER

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"The protection of the uninfected majority depends on and is inextricably bound with the protection of the rights and dignity of the infected persons."

—Dr. Jonathan M. Mann[1]

I. INTRODUCTION

As the AIDS[2] pandemic continues to spread across the globe,[3] so does AIDS-related discrimination.[4] Those afflicted with AIDS have encountered less than thoughtful, responsible, and compassionate reactions to their plight. Whether people react out of fear of contracting the AIDS virus, ignorance of its medical aspects, anti-homosexual biases, or general insensitivity,[5] people with AIDS are encountering discrimination virtually

1. Mann, *AIDS: Discrimination and Public Health*, World Health Org., WHO/GPA/DIR/88.3 (1988), *reprinted in* WORLD HEALTH ORG., LEGISLATIVE RESPONSES TO AIDS 292 (1989) [hereinafter LEGISLATIVE RESPONSES]. Dr. Mann served as director of the World Health Organization's Global Programme on AIDS from 1986 to 1990. *See infra* note 40 and accompanying text.

2. In this Note, "AIDS" (acquired immunodeficiency syndrome) refers generally to the condition of HIV infection and its advanced stages, and "HIV" (human immunodeficiency virus) refers specifically to the AIDS virus.

3. As of June 1991, over 366,000 cases of AIDS had been reported to the World Health Organization (WHO) from 162 countries. Altman, *W.H.O. Says 40 Million Will Be Infected With AIDS Virus By 2000*, N.Y. Times, June 18, 1991, at C3, col. 1. Currently there are an estimated 10 million HIV-infected adults and half a million HIV-infected children. *Id.* WHO estimates that by the year 2000, 40 million people will be HIV-infected. *Id.*

4. Jarvis, *Advocacy for AIDS Victims: An International Law Approach*, 20 U. MIAMI INTER-AM. L. REV. 1, 3 (1988) [hereinafter Jarvis, *Advocacy*]; *see also* Jarvis, *AIDS: A Global View*, 12 NOVA L. REV. 979, 1005-06 (1988); Hilts, *New Study Says AIDS Bias Grows Faster Than Disease*, N.Y. Times, June 17, 1990, at A20, col. 5.

5. *See generally* Dunlap, *AIDS and Discrimination in the United States: Reflections on the*

everywhere—in housing, in the workplace, in schools, in prisons, in the military, in health care, in insurance, at international borders.[6] Convinced that respect for the human rights and dignity of AIDS sufferers is vital to the success of AIDS control and prevention programs, the United Nations' World Health Organization (WHO) has urged its 166 member nations to avoid discrimination against those suffering from AIDS.

On May 13, 1988, the World Health Assembly, the policymaking organ of WHO, adopted the resolution "Avoidance of Discrimination in Relation to HIV-Infected People and People with AIDS" (the Avoidance-of-Discrimination Resolution),[7] a declaration unique in its application of human rights principles to the global AIDS control and prevention strategy.[8] As WHO is not a supranational organization, it possesses no legal authority to establish a country's national health policies or to promulgate international laws for public health controls.[9] A document, such as the Avoidance-of-Discrimination Resolution, therefore, can only serve as a moral beacon for policymakers who choose to steer their nations toward its light.[10]

The AIDS pandemic has provoked worldwide legislative responses, which directly affect its victims. While some nations have acted to protect the human rights of those stricken by AIDS,[11] many have promulgated

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Nature of Prejudice in a Virus, 34 VILL. L. REV. 909 (1989).

6. Since the onset of the AIDS crisis, each of these areas, among others, has been, and continues to be, fertile soil for scholarly legal commentary. *See generally* A. LEONARD, AIDS LEGAL BIBLIOGRAPHY (1989).

7. Res. WHA 41.24, WHO/GPA/INF/88.2 (1988) [hereinafter Avoidance-of-Discrimination Resolution], *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 288-90. The Avoidance-of-Discrimination Resolution is the only World Health Assembly resolution enacted specifically to condemn AIDS-related discrimination. It reaffirms the "London Declaration on AIDS Prevention," adopted by the WHO-sponsored World Summit Ministers of Health Programmes for AIDS Prevention on January 28, 1988, which includes a specific anti-discrimination provision. *See infra* notes 32-36 and accompanying text. Both the Avoidance-of-Discrimination Resolution and the London Declaration are reaffirmed in resolution WHA 42.33 on "Global Strategy for the Prevention of AIDS" and resolution WHA 42.34 on "Non-Governmental Organization and the Global AIDS Strategy," both enacted on May 19, 1989. The Avoidance-of-Discrimination Resolution is also reaffirmed in resolution WHA 43.10 on "Women, Children and AIDS," enacted on May 16, 1990.

8. Tomaševski, *The Prevention of Free Movement of People Across National Boundaries*, 84 AM. SOC'Y INT'L L. PROC. ANN. 177, 177 (1990).

9. *See id.* at 179.

10. *See id.* For a discussion on the utility of using international law to promote the rights of people with AIDS, see Dworkin & Steyer, *AIDS Victims in the European Community and the United States: Are They Protected from Unjustified Discrimination?*, 24 TEX. INT'L L.J. 295 (1989); Jarvis, *Advocacy*, *supra* note 4.

11. This has been accomplished by legislative enactment of specific AIDS-related anti-

discriminatory laws to restrict such rights, ostensibly in the name of protecting the health of the general public.[12] One right so affected by AIDS-related legislation is an individual's right to travel freely from country to country.[13] Attempting to seal their borders from AIDS, nations test suspected persons in order to deny them entry upon disclosure of HIV-positive results.[14] WHO has rejected such constraints on international travel—namely, mandatory screening and testing, involuntary disclosure, and denial of entry—as ineffective, impractical, counterproductive, expensive, and discriminatory.[15]

This Note discusses the efforts of WHO in the fight against AIDS, specifically the Avoidance-of-Discrimination Resolution, and the premise that a society free of discrimination against the infected is one which can ultimately control and prevent the spread of the disease. It explores WHO's rationale in the context of discrimination, which stems from international travel and immigration policies. This Note also examines the border policy of the United States, a WHO-member nation, against the backdrop of WHO's exhortations, as well as those of the international health community.

In the United States, a nation that has one of the largest HIV-infected populations in the world,[16] as policymakers and citizens have clamorously debated in recent years the issue of whether to allow HIV-infected aliens into the country, the government's official stance has conspicuously dithered.[17] Currently holding sway is the Bush administration's position,

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discrimination laws (e.g., as in France) as well as disability-related anti-discrimination laws (e.g., United States). *See infra* note 97.

12. Such policies usually single out specific groups for mandatory HIV screening and, in some countries, even quarantine. *See infra* notes 57-95 and accompanying text. Groups are singled out because their members are considered to have a high risk of contracting HIV as a result of how they behave (i.e., sexually or socially) or where they come from (e.g., sub-Saharan Africa or Haiti). *See infra* notes 50 & 99.

13. This right is internationally recognized. *See* I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 519 (3d ed. 1979).

14. Nelson, *International Travel Restrictions and the AIDS Epidemic*, 81 AM. J. INT'L L. 231 (1987).

15. *Global Programme on AIDS, Statement on Screening of International Travellers for Infection With Human Immunodeficiency Virus*, World Health Org. WHO/GPA/INF/88.3 (1988) [hereinafter *WHO Statement on Screening Travellers*], *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 274; *Special Programme on AIDS, Report of the Consultation on International Travel and HIV Infection* (Mar. 2-3, 1987), World Health Org. [hereinafter *Report on International Travel*], *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 254.

16. *Global Programme on AIDS, Update: AIDS Cases Reported to the Surveillance, Forecasting and Impact Assessment Unit, Office of Research*, World Health Org. (June 1, 1991).

17. DeWitt, *U.S., in Switch, Plans to Keep Out People Infected with AIDS Virus*, N.Y.

which severely restricts the ability of these persons to freely enter the United States.[18] The government's justication has ranged from the fear that foreigners will cause HIV to spread among Americans to the fear that allowing their entry would require costly care at the expense of the American taxpayer.[19] As this Note concludes, these reasons are amiss given internationally accepted medical and scientific evidence. These justifications fail to support a policy, which itself is untenable, and only contravenes the appeals of WHO to "take fully into account . . . the health needs and dignity of HIV-infected people and people with AIDS."[20]

II. THE WORLD HEALTH ORGANIZATION AND AIDS

A. WHO: Its Role and the Global AIDS Strategy

The World Health Organization, established in 1946 in the aftermath of World War II, is a specialized agency of the United Nations.[21] Based in Geneva, WHO is primarily responsible for matters of international and public health, its objective being the assurance of the highest possible level of health for all peoples of the world.[22] The World Health Assembly, the major policymaking arm of WHO, meets annually so that the delegates from the 166 current member nations may exchange research, experience, and ideas.[23]

WHO plans and coordinates health action on a global basis. At the request of a member nation, WHO will assist that nation in planning and carrying out health programs, strengthening its health services, and training its health workers. WHO promotes medical research and the exchange of

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Times, May 26, 1991, at A1, col. 1.

18. Pear, *Ban on Aliens with AIDS to Continue for Now*, N.Y. Times, May 30, 1991, at A23, col. 1.

19. Pear, *Health Dept. Loses in AIDS Rule Dispute*, N.Y. Times, May 28, 1991, at A18, col. 4.

20. Avoidance-of-Discrimination Resolution, *supra* note 7.

21. The Constitution of WHO was adopted on July 22, 1946, by the International Health Conference, which was convened and held in New York by the Economic and Social Council of the United Nations. BASIC FACTS ABOUT THE UNITED NATIONS 95, U.N. Sales No. E.77.I.3 (1977). WHO came into being on April 7, 1948. *Id.*

22. WHO CONST. art. 1.

23. *Id.* arts. 10-23. The work of WHO is carried out by three organs: the World Health Assembly; the Executive Board, which meets semiannually and consists of 30 persons designated by as many member states elected by the Assembly, *id.* arts. 24-29; and the Secretariat, which consists of the Director-General and technical and administrative staff. *Id.* arts. 30-37.

scientific information; makes health regulations for international travel; keeps communicable diseases under constant surveillance; collects and disseminates data on health matters; and sets standards for the control of drugs, vaccines, and other substances affecting health.[24]

Since the emergence of the AIDS crisis in the 1980s, WHO has undertaken the task of directing and coordinating the worldwide fight against the disease. In February 1987, WHO established its Special Programme on AIDS to provide global leadership and ensure international cooperation, chiefly by lending support to national programs for the control and prevention of AIDS.[25] The Special Programme subsequently was endorsed by the World Health Assembly in May 1987 in its resolution "Global Strategy for the Prevention and Control of AIDS."[26] The resolution empowered the director-general of the Special Programme to assert WHO's international directing and coordinating role in support of national AIDS programs and to report on progress in implementing the "Global AIDS Strategy" to WHO's Executive Board and the Assembly annually.[27] Currently, WHO's Global Programme on AIDS (formerly the Special Programme) coordinates worldwide surveillance of AIDS.[28] WHO's Global Commission on AIDS, created in early 1989, consists of an international group of researchers that provides WHO with expert guidance and interpretation of global trends related to HIV.[29]

WHO's directing and coordinating role has been officially endorsed by governments all over the world. Within one year of instituting the Special Programme in 1987, 115 countries—including forty-four in Africa; twenty-seven in the Middle East, Asia, and Oceania; thirty-eight in the Americas; and six in Europe—had benefitted from WHO's collaboration in starting, supporting, and strengthening their national AIDS programs.[30]

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24. *Id.* arts. 2(a)-(v).

25. *Special Programme on AIDS, Progress Rep. I* (Apr. 1987), World Health Org. WHO/SPA/GEN/87.2 (1987), *reprinted in* M. CLOSEN, D. HERMANN, P. HORNE, S. ISAACMAN, R. JARVIS, A. LEONARD, R. RIVERA, M. SCHERZER, G. SCHULTZ & M. WOJCIK, AIDS: CASES AND MATERIALS 922 (1989) [hereinafter M. CLOSEN].

26. Res. 40.26, WHA/SPA/40.26 (1987), *reprinted in* WORLD HEALTH ORG., THE WORK OF WHO 1986-87, BIENNIAL REPORT OF THE DIRECTOR-GENERAL TO THE WORLD HEALTH ASSEMBLY AND TO THE UNITED NATIONS 181 (1988).

27. *Id.*

28. *Global Strategy for the Prevention and Control of AIDS, Report by the Director-General*, 42 World Health Assembly, World Health Org., (Provisional Agenda Item 19) at 6, A42/11 (1989).

29. *Global Programme on AIDS, Report of the Global Commission on AIDS First Meeting* (Mar. 21-31, 1989), World Health Org. at 1, GPA/GCA (1) 89.1 (1989) [hereinafter GCA Report].

30. WORLD HEALTH ORG., FOUR DECADES OF ACHIEVEMENT: HIGHLIGHTS OF THE WORK

Today, 155 of the 166 countries served by WHO have benefitted from this collaboration.[31]

B. Avoidance-of-Discrimination Pronouncements

1. The London Declaration

On January 28, 1988, in London, WHO co-sponsored (with the United Kingdom government) the World Summit of Ministers of Health on Programmes for AIDS Prevention involving delegates from 148 nations. The summit adopted the London Declaration on AIDS Prevention, which includes the following provision explicitly condemning AIDS-related discrimination: "We emphasize the need in AIDS prevention programmes to protect human rights and human dignity. Discrimination against, and stigmatization of, HIV-infected people and people with AIDS and population groups undermine public health and must be avoided."[32]

The summit set out a "Global AIDS Strategy" of three objectives: to prevent HIV infection; to reduce the personal and social impact of HIV infection, including cure of those already infected with HIV and with AIDS; and to unify national and international efforts.[33] This global strategy rests on several principles, including the assumption that "human rights must be respected and discrimination must be prevented."[34] To meet the objective of preventing HIV infection, the summit initiated a

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OF WHO 34-35 (1988). At the request of these governments, WHO has provided staff and organized training workshops in the latest AIDS laboratory techniques. *Id.* To encourage strong international leadership, WHO has convened inter-country meetings that have marked turning points in national and regional awareness and action. *Id.* In collaboration with world-renowned scientists, WHO has: organized a global bank for HIV; issued guidelines on subjects such as AIDS and international travel, AIDS control in prisons and stringent disinfection methods; laid down standards for screening and testing programs; and begun coordinating global strategies for the testing of vaccines as soon as they are ready for clinical trial. *Id.* In collaboration with others, WHO is determining the economic and demographic impact of the disease and is designing models to help predict the future course of the epidemic. *Id.* For a summary of WHO's Global AIDS Strategy, see Mann, Dam & Kay, *Global Coordination of National Public Health Strategies*, 18 L., MED. & HEALTH CARE 20 (1990).

31. Hilts, *Leader in U.N.'s Battle on AIDS Resigns Post in Dispute Over Strategy*, N.Y. Times, Mar. 17, 1990, at A5, col. 6.

32. London Declaration on AIDS Prevention, Jan. 28, 1988, *reprinted in* M. CLOSEN, *supra* note 25, at 924-26.

33. Global AIDS: Epidemiology, Impact, Projections and the Global Strategy, (statement given at the World Summit of Ministers of Health on Programmes for AIDS Prevention, London, Jan. 26-28, 1988), *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 284.

34. *Id.*

campaign to educate and inform people about AIDS in the hope of creating a tolerant and supportive social environment free of discrimination.[35] The summit reaffirmed the position of WHO that a discrimination-free environment is more likely to protect the general public from the spread of HIV than the implementation of measures that single out the carrier. The delegates agreed:

> There is no public health rationale to justify isolation, quarantine, or other discriminatory measures based solely on a person's HIV infection status or practice of risk behavior. Preventing discrimination not only protects human rights, but helps ensure an effective AIDS programme. Discrimination will undermine the entire national information campaign program; thus, discrimination can endanger public health.[36]

2. The Avoidance-of-Discrimination Resolution

On May 13, 1988, the World Health Assembly adopted its Avoidance-of-Discrimination Resolution, the first resolution enacted specifically to condemn AIDS-related discrimination.[37] In endorsing the London Declaration, the resolution reaffirms the Declaration's anti-discrimination provision by urging member states to:

(1) foster a spirit of understanding and compassion for HIV infected people and people with AIDS through information, education and social support programmes;
(2) *protect the human rights and dignity of HIV-infected people and people with AIDS, and of members of population groups, and to avoid discriminatory action against and stigmatization of them in the provision of services, employment and travel*;
(3) ensure the confidentiality of HIV testing and to promote the availability of confidential counseling and other support services to HIV-infected people and people with AIDS; [and]

35. *Id.*

36. *Id*; *Special Programme on AIDS, Social Aspects of AIDS Prevention and Control Programmes*, World Health Org. WHO/SPA/GLO/87.2 (1987) [hereinafter *Social Aspects*], *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 273.

37. *See supra* note 7.

(4) include in any reports to WHO on national AIDS strategies information on measures being taken to protect the human rights and dignity of HIV-infected people and people with AIDS.[38]

C. *The Nexus Between the Avoidance of Discrimination and the AIDS Control and Prevention Strategy*

In its preamble, the Avoidance-of-Discrimination Resolution states that respect for the human rights and dignity of AIDS sufferers "is vital to the success of national AIDS control and prevention programmes and of global strategy."[39] Dr. Jonathan M. Mann, former director of the Global Programme,[40] argues that there is a strong and clear public health rationale for this emphasis on protecting the human rights and dignity of HIV-infected persons.[41] HIV is transmitted mainly through behaviors and specific actions, which are generally subject to control.[42] Usually, HIV transmission involves the behavior of two persons—one infected and one not.[43] Dr. Mann believes that it is the change in behavior of these two people which will be sufficient to prevent HIV transmission.[44] HIV is transmitted, however, through behaviors (sexual, self-injecting) that are private, secret, and hidden from society, and may well be illegal in some societies.[45] Although most people understand that HIV cannot be spread through casual contact, irrational fear and anxiety about its transmission

38. Avoidance-of-Discrimination Resolution, *supra* note 7, at 289 (emphasis added).

39. *Id.*

40. *See supra* note 1. Dr. Mann, currently a professor of epidemiology at the Harvard University of Public Health and chairman of the 1992 International Conference on AIDS, resigned as director of the Global Programme on AIDS in March 1990, the news of which was front-page in the *New York Times*. Hilts, *supra* note 31, at A1, col. 1. He is regarded as the driving force in persuading many countries, especially in the developing world, to recognize AIDS, prevent the spread of HIV and treat victims of the disease. *Id.* Before joining WHO, Dr. Mann was head of the National Centers for Disease Control's (CDC's) AIDS program in Zaire. *Id.* Greatly owing to his international fundraising efforts and leadership, the Global Programme grew in four years from a program with a $500,000 annual budget and a staff of one to the largest program in WHO's history, with a $109 million annual budget and a staff of 220. *Id.*

41. Mann, *supra* note 1, at 291.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

nevertheless unleashes deep, dark prejudices.[46]

If people who are infected with (or suspected of being infected with) HIV are stigmatized and discriminated in areas as basic as employment, education, housing, and travel, they will actively avoid detection.[47] They will, at the same time, lose contact with health and social service organizations, which could have helped them and simultaneously helped stem the spread of HIV.[48] Those needing information, education, counseling, or other support services would be "driven underground."[49] For those not already infected, but in high-risk groups[50] and suspected of being infected, their reluctance to seek out assistance for fear of being reported could be foreboding.[51] The upshot, according to Dr. Mann, would be to place educational outreach in serious jeopardy and thereby exacerbate the difficulty of preventing HIV infection.[52]

Dr. Mann and WHO take the position that in order to prevent HIV infection effectively, persons whose behavior places them at an increased risk of exposure to HIV must be informed, educated, and provided with health and social services.[53] Persons suspected or known to be HIV-infected should remain *integrated* in society to the maximum possible extent and assume responsibility for preventing HIV transmission to others.[54] Exclusion of—discrimination against—these persons would be justified in public health terms and thus could undermine the public health program to prevent HIV infection.[55]

In order to increase the probability of preventing HIV infection,

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46. *Id.* at 290. The fact that AIDS *does* raise the specter of death leads those uneducated in the risks of transmission to "fear that any error in the calculation of risk is likely to result in death." Tillet, *AIDS, Discrimination and the Law*, in NAT'L CONFERENCE ON AIDS, LIVING WITH AIDS: TOWARD THE YEAR 2000, at 705 (1988).

47. Mann, *supra* note 1, at 291.

48. *Id.*

49. *Id.*

50. High-risk groups are identified and grouped according to behavior patterns: male homosexuals/bisexuals, intravenous drug users, prostitutes, hemophiliacs and transfusion recipients. *See* Druhot, *Immigration Laws Excluding Aliens on the Basis of Health: A Reassessment After AIDS*, 7 J. LEGAL MED. 85, 109 (1986); *supra* note 12; *infra* note 99. High-risk groups are also geographically defined, by areas where AIDS is thought to have its origins or known to be prevalent, *see supra* note 12; *infra* note 99, though such categorization is not condoned by WHO. *See Social Aspects, supra* note 36, at 273,

51. Mann, *supra* note 1, at 291.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 292

society's non-risk members ought to be no less informed and educated than its high-risk members. The fears and prejudices of the uninfected majority must be allayed and replaced by tolerance and compassion so that those infected or suspected of being infected do not avoid detection and, in turn, medical and social assistance.[56] Put differently, the general public must come to appreciate the significance of the integration of HIV-infected persons into society as a means of controlling and preventing AIDS.

III. AIDS-RELATED DISCRIMINATION AT THE BORDER

A. Mandatory Testing and Screening: Involuntary Disclosure

WHO's Avoidance-of-Discrimination Resolution specifies travel among the areas where discriminatory action against people with AIDS should be avoided and stresses the need for confidentiality in testing and counseling.[57] As AIDS threatens to extend beyond the boundaries of more countries, more governments must face the task of protecting their citizens.[58] In the name of public health, a country owes a duty to its citizens to exclude HIV from its territory and to slow its progress once the virus permeates its borders.[59] Arguably, one strategy is the decision by a country to mandatorily screen or test foreigners for HIV before allowing them to enter.[60]

Screening and testing policies raise the concomitant issue of confidentiality. Confidentiality of seropositive[61] test results is of paramount

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56. *Id.*

57. Avoidance-of-Discrimination Resolution, *supra* note 7.

58. Comment, *AIDS and Immigration: The United States Attempts to Deport a Disease*, 20 U. MIAMI INTER-AM. L. REV. 131, 152 (1988).

59. *Report on International Travel*, *supra* note 15, at 257.

60. Nelson, *supra* note 14, at 235. "Screening" is the examination of entire populations or groups within populations to determine their infection or disease status. *Special Programme on AIDS, Screening and Testing in AIDS Prevention and Control Programmes*, World Health Org. WHO/SPA/INF/88.1 (1988) [hereinafter *WHO Screening and Testing*], *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 277. "Testing" is the determination of infection or disease for an individual. *Id.*

With the isolation and identification of HIV, serologic tests to detect antibodies against the virus were rapidly developed and became available for general use in 1985. *Report on International Travel*, *supra* note 15, at 256. In contrast to some other viral infections, HIV induces antibodies that do not, in most cases, appear to confer immunity to the individual. *Id.* Most persons with positive tests for HIV antibody are simultaneously and actively infected by HIV and must be considered potentially infectious. *Id.*

61. Seropositive is defined as "showing positive results on serological examination. Showing a high level of antibody." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1408 (27th ed.

importance to one so infected because of the stigma and depression an individual, and his or her family, would have to endure should the test results become disclosed, especially if against the victim's will.[62] Consequences of disclosure also include the fear of loss of companionship and employment, and of potential denial of housing, medical care, insurance, and visitation of children.[63]

Confidentiality is of no less import based on the fact that AIDS is so closely associated with the highly sensitive and personal areas of sexual contact and sexual identity.[64] The climate of hysteria surrounding AIDS creates the possibility that injustice may occur to high-risk groups, such as homosexuals, a group already the target of discrimination.[65] WHO has stated that the benefits of HIV screening and testing must be balanced against the negative implications and ethical concerns that arise when such personal information is disclosed.[66] These concerns are very real, for such disclosure often leads to social ostracism and discrimination.[67]

WHO recognizes the danger and possible stigmatization to persons, especially members of certain high-risk groups, should the results of screening and testing be disclosed and has stated that "human rights are best respected by using the least intrusive measures which are necessary to accomplish specific public health objectives."[68] Despite a country's public health justification for HIV screening or testing, WHO takes the position that "no screening [or testing] programme of international travellers can *prevent* the introduction and spread of HIV infection."[69] Such programs would be costly and "only briefly" retard the dissemination of HIV, both globally and within a particular country.[70] They would also

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62. Closen, Conner, Kaufman & Wojcik, *AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need for Private Serologic Testing*, 19 J. MARSHALL L. REV. 835, 843 (1986) [hereinafter Closen].

63. *Id.*; *see also Special Programme on AIDS, Report of WHO Meeting on Criteria for HIV Screening Programmes*, World Health Org. WHO/SPA/GLO/87.2 (1987) [hereinafter *WHO Criteria for Screening*], in LEGISLATIVE RESPONSES, *supra* note 1, at 270.

64. *WHO Criteria for Screening*, *supra* note 63, at 263; *see also* Note, *The Impact of AIDS on Immigration Law: Unresolved Issues*, 14 BROOKLYN J. INT'L L. 223, 240 (1988).

65. *WHO Criteria for Screening*, *supra* note 63, at 272; *see also* Closen, *supra* note 62, at 846-48; Comment, *supra* note 58, at 160; Note, *supra* note 64, at 240.

66. *WHO Criteria for Screening*, *supra* note 63, at 265.

67. *Id.*

68. *Id.* at 270.

69. *WHO Statement on Screening Travellers*, *supra* note 15, at 274; *Report on International Travel*, *supra* note 15, at 261.

70. *WHO Statement on Screening Travellers*, *supra* note 15, at 274; *Report on International*

be ineffective and impractical because HIV infection is already present in every region and in virtually every major city in the world.[71] Even the total exclusion of foreigners cannot prevent the introduction and spread of HIV.[72] Further, tests to determine HIV infection are not perfect.[73] Not all HIV-infected persons will test positive; indeed, many (especially those recently infected) are likely to test negative.[74]

In lieu of screening and testing, WHO favors controlling and preventing the spread of HIV through educational awareness of how it is transmitted.[75] WHO takes the position that voluntary testing, rather than mandatory screening and testing, when incorporated with counseling and education, is more likely to control and prevent the spread of HIV.[76] The role of mandatory screening and testing for HIV should be very limited in any AIDS control and prevention program. If used, it should provide informed consent and counseling and ensure confidentiality.[77]

B. Exclusion and Deportation

Not only does mandatory screening or testing, coupled with subsequent involuntary disclosure of seropositivity, have a lasting and traumatic effect on a foreigner's dignity, but also, and more practically, it prevents the person from reaching his destination. The AIDS pandemic has had a direct impact on entry and immigration policies that implicate public health concerns. More countries have made HIV infection a ground for exclusion from their frontiers and have incorporated the HIV test in their medical examinations of foreigners.[78] As a result, immigrants, aliens seeking to

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Travel, supra note 15, at 261.

71. *WHO Statement on Screening Travellers, supra* note 15, at 275.

72. *WHO Statement on Screening Travellers, supra* note 15, at 275. It should be noted that universal screening of donors of blood, blood products, cells, tissues and organs is wholly warranted by WHO. *WHO Criteria for Screening, supra* note 63, at 271.

73. *WHO Statement on Screening Travellers, supra* note 15, at 275. *See generally* Banks & McFadden, *Rush to Judgment: HIV Test Reliability & Screening*, 23 TULSA L.J. 1 (1987); Barry, Cleary & Fineburg, *Screening for HIV Infection: Risks, Benefits, and the Burden of Proof*, 14 LAW, MED. & HEALTH CARE 259 (1986); Meyer & Pauker, *Screening for HIV: Can We Afford the False Positive Rate?*, 317 NEW ENG. J. MED 238 (1987).

74. *WHO Statement on Screening Travellers, supra* note 15, at 275; *Report on International Travel, supra* note 15, at 255-56. For a discussion on the consequences of false positive results from mandatory screening of aliens, see Starr, *The Ineffectiveness and Impact of HIV Exclusion in United States Immigration Law*, 3 GEO. IMMIGR. L.J. 87, 92-96 (1989).

75. *WHO Statement on Screening Travellers, supra* note 15, at 277.

76. *WHO Criteria for Screening, supra* note 63, at 271.

77. *WHO Screening and Testing, supra* note 60, at 278.

78. *See* PANOS INSTITUTE, AIDS AND THE THIRD WORLD app II, at 177-78 (1989) (listing

adjust their status to permanent residency, undocumented aliens seeking legalization, refugees, tourists, business travellers, and students are being turned away at international borders—their rights of mobility and privacy infringed.[79]

For HIV-infected aliens seeking legalization, an added concern is that they may be deported to countries unable to counsel or treat them and may encounter further discrimination.[80] As for countries that have exclusion and deportation policies, they run the risk of retaliatory measures by other countries, which could lead to the reduction of travel opportunities available to citizens.[81] HIV infection exclusion has been called "xenophobic"[82] and "ineffective" as a means of controlling and preventing the spread of HIV.[83] It is inconsistent with WHO's position that freedom of travel should not be compromised.[84]

C. *The Quarantine Extreme*

Probably the most controversial governmental reaction to the worldwide AIDS crisis has been the decision by several countries to quarantine HIV-infected persons as a measure to control the spread of HIV and protect the uninfected members of society.[85] Governments exercising police power in the name of public health place their own citizens in isolation, as well as foreigners.[86] Quarantine as a control device has been

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over 30 countries with AIDS-related travel restrictions).

79. Starr, *supra* note 74, at 87-88.

80. Starr, *supra* note 74, at 105-08. This is especially true in cases where illegal aliens from poorer areas like Mexico, the Caribbean, and Central and South America seek legal status in the United States. *See id.* at 106 n.122.

81. *Id.* at 108-09; *see also* 52 Fed. Reg 32, 541 (1987); Wolchok, *AIDS at the Frontier: United States Immigration Policy*, 10 J. LEGAL MED. 127, 134-35 (1989). Reprisals—in the form of boycotts or relocations—can also be launched by the international health community, as the United States, an erstwhile host country to the International Conference on AIDS, is well aware. *See infra* notes 136, 145-47, & 170 and accompanying text.

82. Starr, *supra* note 74, at 110; *see also* Wolchok, *supra* note 81, at 135.

83. Starr, *supra* note 74, at 110.

84. *See WHO Statement on Screening Travellers*, *supra* note 15; *Report on International Travel*, *supra* note 15.

85. Defined broadly, quarantine is the isolation from the public of those afflicted with or exposed to an infectious disease. Ford & Quam, *AIDS Quarantine: The Legal and Practical Implications*, 8 J. LEGAL MED. 353, 356 (1987).

86. For example, in Cuba, where by 1989 approximately one-third of the population had been tested for HIV, 240 infected persons were put into quarantine as of February 1989, isolated indefinitely. *Cuba's Quarantine for AIDS*, N.Y. Times, Feb. 6, 1989, at A14, col. 1 (editorial)

called "the most extreme form of action that a government [may] take in the name of public health,"[87] as well as "archaic,"[88] "anachronistic,"[89] and "an instrument of . . . public bigotry."[90]

For AIDS sufferers, quarantine leads to heightened fear, discrimination, privacy invasion, and the stigma of being branded as quarantined.[91] In addition, countries with quarantine policies affecting HIV-infected foreigners may be subject to reprisals by other countries, thus leading to worldwide restrictions on travel.[92] Tourism and international business would suffer from escalating "quarantine wars," while tension and rivalry among countries could flare.[93] WHO flatly disapproves of quarantine as a measure for preventing the spread of HIV.[94] As HIV cannot be transmitted by casual contact, quarantine is considered a harsh, unjustified, and impractical measure of prevention of its spread.[95]

[hereinafter *Cuba's Quarantine*]; *see also* Simons, *A Latin AIDS Meeting Opens Its Ears to What Was Once Unmentionable*, N.Y. Times, Jan. 13, 1989, at A3, col. 1. In 1988, seven million Cubans were tested under a mandatory testing policy that affected every man, woman, and child over the age of 15. Betancourt, *Cuba's Callous War on AIDS*, N.Y. Times, Feb. 11, 1988, at A35, col. 2. Cuba requires foreigners, but not tourists, and Cubans returning home from "endemic areas" to be tested. PANOS INSTITUTE, *supra* note 78, at 177. If results are negative, the test is repeated six months later. *Id.* Many of those tested were soldiers and civilians returning from Angola. *Cuba's Quarantine*, *supra*, at A14, col. 1, where HIV has spread from the Central African strongholds, Zaire and Congo. Brooke, *AIDS Spreading into Border Areas of Angola*, N.Y. Times, Feb. 19, 1989, at A10, col. 1. Forty-seven thousand soldiers were expected to return to Cuba from early 1989 to mid-1991, as well as 3,000 civilians, namely, construction workers, teachers, doctors, and diplomats. *Cuba's Quarantine*, *supra*, at A14, col. 1.

Quarantine of HIV-infected persons is also permitted in South Africa, the Soviet Union and the German State of Bavaria. PANOS INSTITUTE, *supra*note 78, at 120.

87. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 54 (1985).

88. *Id.* at 53.

89. *Id.* at 89.

90. *Id.* at 90.

91. Comment, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 217, 232 (1986).

92. Comment, *supra* note 58, at 158-59.

93. *Id.*; *see also* Nelson, *supra* note 14, at 234.

94. *Social Aspects*, *supra* note 36, at 273. It should be noted, however, that the WHO Constitution authorizes the World Health Assembly to adopt sanitary and quarantine requirements. WHO CONST. art. 21(a).

95. Comment, *supra* note 91, at 230. *But see* Note, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441 (1988) (advocating the use of quarantine against HIV carriers).

IV. CONTRAVENING WHO'S DIRECTIVES: THE MALLEABLE BORDER POLICY OF THE UNITED STATES

As WHO possesses no legal authority to establish national health policies, a country's decision to comply with a World Health Assembly resolution, such as the Avoidance-of-Discrimination Resolution, is a moral choice.[96] While some countries have been sensitive to the plight of people with AIDS and enacted legislation consistent with the appeals of the resolution,[97] others have reacted with legislation spawned by hostility, suspicion, blame, and fear.[98] These latter countries have sought preventive measures to combat AIDS at the expense of depriving suspected AIDS sufferers of their human rights and magnifying the stigmatization already associated with particular high-risk groups.[99] In recent years, the world has witnessed a rapid growth in the number of policies affecting movement across international frontiers, which identify, control, and isolate people

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96. *See* Tomaševski, *supra* note 8, at 179.

97. *See supra* note 11. France, for example, has a comprehensive set of AIDS-related laws employing language consistent with the anti-discriminatory spirit of WHO-sponsored pronouncements. These laws specifically address testing of and care for military personnel, hospital patients and aliens. *See* LEGISLATIVE RESPONSES, *supra* note 1, at 73-79. In the United States, the Americans With Disabilities Act of 1990 extends protections that the Civil Rights Act of 1964 gave against discrimination based on sex, religion, color, race or national origin to people with physical or mental disabilities, including people with AIDS. 42 U.S.C. § 12101 (1990).

98. Jarvis, *Advocacy*, *supra* note 4, at 3.

99. The singling out of prostitutes, a behaviorally defined high-risk group, in the German State of Bavaria is demonstrative of this. In western Germany, where prostitution has long been legal or at least tolerated, Bavaria, known to have the most stringent AIDS laws in the world, enacted legislation that presumes that male and female prostitutes and intravenous drug users are suspected to be HIV-infected. Notice No. IE/IA/IC-5280-8.2/7/87 of the Bavarian Ministry of the Interior: Law Applicable to Aliens, and the Medical Examination Prior to the Issue of a Residence Permit, May 19, 1987, *reprinted in* LEGISLATIVE RESPONSES, *supra* note 1, at 52 [hereinafter Bavarian AIDS Law]; *see also* Schmemann, *What to Do? Bavaria Has Some Strict Ideas*, N.Y. Times, July 12, 1987, § 4 (The Week in Review), at 3, col. 4. Health officials have the power to test persons who are already infected, or presumed or suspected of being infected, proceeding on the basis of their own information and information obtained by the police or security officials. Bavarian AIDS Law, *supra*, at 53. An individual may be tested at any time, and if he or she fails to comply or resists testing, police assistance may be sought. *Id.* at 54. If tests results are negative, the person is still suspected of being infected, and the test is repeated quarterly. *Id.* If test results are positive, the individual is placed under surveillance of the Health Offices and the police, to whom the person's address is submitted; *id.* these authorities must be informed of any change of address. *Id.* at 55.

African students, a geographically defined high-risk group, have also been singled out in Cyprus and in Germany by AIDS-related legislation that prohibits them from entering those countries. PANOS INSTITUTE, *supra* note 78, at 177.

with AIDS.[100] Notorious among them has been the malleable border policy of the United States, a WHO-member nation that has incurred the consternation and condemnation of public health authorities, medical experts, and AIDS activists worldwide. In 1991, just when it appeared that the government was on the verge of officially lifting its much-criticized set of restrictive regulations at the behest of WHO, it about-faced. This retreat was testimony to the political sensitivity of the issue, as conservative lawmakers and administration officials capitulated to the voices of irrational fear across the country.

A. Adding HIV to the List of Diseases Excluding Aliens from the United States: The Helms Amendment

Prior to August 31, 1987, the list of "dangerous contagious diseases" used by the Justice Department's Immigration and Naturalization Service (INS) for denying admission of aliens into the United States included chancroid, gonorrhea, granuloma inguinale, leprosy (infectious), lymphogranuloma venereum, syphilis (infectious stage), and tuberculosis (active).[101] Any alien afflicted with one of these seven medical conditions was ineligible to receive a visa and was excluded from admission into the country.[102] In June 1987, the Senate voted 96-0 to approve an amendment offered by Senator Jesse Helms, Republican of North Carolina, to an appropriations bill that required the President to add HIV to the list by August 31.[103] The overwhelming vote was curiously made without the benefit of any committee study on AIDS-related legislation or much congressional debate.[104]

The INS uses the list, which is maintained by the Public Health Service (PHS) of the Health and Human Services Department (HHS), to deny entry to any aliens afflicted with any of the prescribed diseases, whether they are seeking temporary or permanent residence in the United States (i.e., aliens applying either for immigrant visas abroad or for routine adjustment of status to permanent residency).[105] These aliens are tested

100. *See supra* note 78 and accompanying text.

101. 42 C.F.R. § 34.2(b) (1987).

102. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6) (1982).

103. Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391 (1987).

104. Fuerbringer, *Senate Votes to Require Test of Aliens for AIDS Virus*, N.Y. Times, June 3, 1987, at B8, col. 1.

105. 8 U.S.C. § 1182(a) (1988). Visas are issued (or denied) by the State Department's Bureau of Consular Affairs.

in their native countries and if seropositive, are subject to exclusion and denied permanent residence status;[106] they may not seek a waiver of exclusion.[107] Those seeking short-term entry (i.e., persons such as tourists or business visitors—all of whom apply for nonimmigrant visas) are not required to undergo testing,[108] but must complete a visa application declaring whether they have any of the diseases, state which one, and apply for a thirty-day waiver of restrictions.[109] The waiver declares that the danger to the public health will be minimal and that there will be no costs incurred by governmental agencies by the visit.[110]

Up until 1990, any foreigner who was granted a waiver had his passport stamped with large numbers indicating that the waiver was for a dangerous contagious disease, with details put on file at the American Embassy in the applicant's home country.[111] Those who did not declare that they had one of the diseases could escape detection.[112] INS officials, however, could require testing of anyone who was suspected of being HIV-infected, and have relied on two methods of identifying such visitors.[113] First, applicants for visas may be questioned whether they have a contagious disease,[114] and later, at the border, customs agents may look for signs of the disease, like physical wasting, or for indications that a visitor was in a high-risk group, such as homosexuals.[115] This can often

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106. 52 Fed. Reg. 32, 542 (1987). Less than a week after the Senate vote, PHS added AIDS, not HIV, to the list. 52 Fed. Reg. 21, 532-33 (1987). In August, it issued new rules substituting HIV for AIDS to conform with the Helms amendment and also requiring serologic testing of all applicants seeking permanent residence. 52 Fed. Reg. 32,542 (1987).

107. 52 Fed. Reg. 32, 542 (1987). Waivers may be obtained, however, if the alien is seeking a temporary non-immigrant visa, is a legalization applicant or a refugee. *Id.*

108. *Id.* These persons may be tested at the discretion of a consular officer overseas or an immigration inspector at a United States port of entry if there is reason to suspect an excludable condition. 52 Fed. Reg. 21, 607 (1987).

109. Hilts, *U.S. to Ease Passport Curbs on Visitors Infected with AIDS Virus*, N.Y. Times, Jan 17, 1990, at B6, col. 1; *INS Announces Change in Visa Requirements for Conference Attendees; Applicants Not Required to Identify HIV Status*, U.S. Newswire, Apr. 13, 1990.

110. Statement of James A. Pulea, INS Assistant Commissioner for Examinations (Mar. 2, 1988), *reprinted in* 65 INTERPRETER RELEASES 239 (1988).

111. Hilts, *supra* note 109, at B6, col. 1; Pallot, *Call for Boycott of AIDS Conference*, Daily Telegraph (London), Nov. 20, 1989, at 4, col. 1.

112. Hilts, *In Shift, Health Chief Lifts Ban on Visitors with the AIDS Virus*, N.Y. Times, Jan 4, 1991, at A1, col. 6.

113. *Id.*

114. *Id.*

115. *Id.* A 1989 *New York Times* op-ed page article related a first-hand account of two persons who were travelling in a car from Montreal to Vermont with two friends who were

lead to a luggage search for evidence, like medicine to treat AIDS.[116] INS officials could then ask the traveler to seek a waiver.[117] Persons who contract HIV after their arrival in the United States cannot be deported solely because they have the virus.[118]

The most visible consequence of the addition of HIV to the list of diseases was that HIV-infected visitors were barred from entering the United States to attend medical and scientific conferences and meetings.[119] Indeed, the Helms amendment went almost unnoticed by AIDS activists and public health authorities for nearly two years until the detention and jailing of a Dutch visitor at a United States airport, after a luggage search, prompted loud criticism, protest, and calls for legislative change.

B. The Verhoef Affair and the International Campaign Mounted in Its Aftermath

In April 1989, Hans Paul Verhoef, a public health worker from Rotterdam, was en route to a gay health conference in San Francisco when customs inspectors at Minneapolis-St. Paul International Terminal searched his luggage and discovered a vial of the drug AZT, which is used in the treatment of AIDS.[120] Mr. Verhoef did not declare he was an AIDS patient on his visa application, but acknowledged that he had the disease when the inspectors asked him about it.[121] When Mr. Verhoef turned over a letter he had with him confirming that he had AIDS, he was told he could go back to the Netherlands or stay in jail pending a deportation

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subject to such an inspection. Altman & Orkin, *A Neanderthal Law on AIDS*, N.Y., Times, Dec. 2, 1989, at A27, col. 1. At the border, the party was detained by the United States customs and immigration officials. *Id.* One member of the party was carrying literature on AIDS, which was taken as suggesting that he was HIV-infected, and therefore, not to be admitted into the United States. *Id.* Another passenger had a shaven head, for reasons of vanity rather than health, which also raised the suspicion of the authorities who insisted on inspecting his scalp. *Id.* The party was finally admitted after it became clear that the officials did not know how to determine HIV status on sight. *Id.*

116. Hilts, *supra* note 112, at A1, col 6.; *see infra* text accompanying notes 120-27.

117. Hilts, *supra* note 112, at A1, col 6.

118. 52 Fed. Reg. 32,542 (1987).

119. Hilts, *supra* note 112, at A1, col 6.

120. Zonana, *Dutch AIDS Patient Freed; Travels to S.F.*, L.A. Times, Apr. 9, 1989, at 3, col. 5.

121. Johnston, *U.S. Will Ease Visa Restrictions for Some Who Suffer from AIDS*, N.Y. Times, May 19, 1989, at D16, col. 1.

hearing.[122] Mr. Verhoef asked the INS to waive its rules excluding AIDS patients under a section of the law that allows the agency to lift the rules for visitors who pose a minimal public health risk.[123] When the agency refused, he appealed to a federal immigration judge.[124] The judge overruled the INS and held that Mr. Verhoef should be permitted entry because he represented only a slight risk of transmitting the disease.[125] The Board of Immigration Appeals rejected the INS appeal of the judge's order.[126]

After spending six days in a Minnesota state prison, and after posting a $10,000 bond and agreeing to leave the country after three weeks, Mr. Verhoef was freed to continue on his trip to the California conference.[127]

The wake of Mr. Verhoef's ordeal brought the United States' restrictive border policy under the scrutiny of congressional officials, AIDS activists, and public health authorities, such as WHO, the international societies of the Red Cross, and the National Commission on AIDS—all of whom denounced it as discriminatory and unjust.[128] Lawmakers, such as Senator Alan Cranston, Democrat of California, began to call for a change in the regulation which they said was intended to be applied to immigrants and illegal aliens seeking permanent residence, not short-term visitors.[129]

Critics of the regulation claimed that it jeopardized international scientific cooperation, embarrassed the United States government, and invited retaliation against Americans travelling abroad.[130] Of immediate

122. Boodman, *U.S. Ban on Tourists with HIV Surprises Some Lawmakers; Jailing of Visitor Sparks Calls for Change in Policy*, Wash. Post, Apr. 14, 1989, at A2, col. 1.

123. Johnston, *supra* note 121, at D16, col. 1.

124. *Id.*

125. *Id.*

126. Zonana, *supra* note 120, at 3, col. 5; *Alien with AIDS Is Ordered Freed*, N.Y. Times, Apr. 8, 1989, at A9, col. 6 [hereinafter *Alien with AIDS*]. The judge accepted Mr. Verhoef's pledge that he would avoid high-risk behavior during his stay in the United States when he ruled that Verhoef's three-week visit posed "minimal risk to the United States." Zonana, *supra*, at 3, col. 5.

127. Zonana, *supra* note 120, at 3, col. 5; *Alien with AIDS*, *supra* note 126, at A9, col. 6. According to the INS, prior to Mr. Verhoef's successful challenge to its regulation, about a dozen HIV-infected foreigners had been turned away from the United States' borders. Zonana, *supra*, at 3, col. 5. Mr. Verhoef died on July 23, 1990.

128. Specter, *Major Groups Plan to Boycott San Francisco AIDS Meeting; U.S. Restrictions on Immigration Criticized*, Wash. Post, Dec. 13, 1989, at A2, col. 1.

129. Boodman, *supra* note 122, at A2, col. 1.

130. *Id.*

concern was the upcoming Fifth International AIDS Conference in Montreal, which would attract conferees worldwide, some of whom were HIV-infected and who were expected to arrive by way of United States cities or travel in the United States during their trip.[131] Senator Cranston, in letters to Attorney General Dick Thornburgh and Secretary of State James Baker, said that the policy was an embarrassment to the United States since it has more AIDS cases than any other country and has condemned the screening of travellers by way of WHO.[132]

In May, one month after the Verhoef incident and three weeks before the Montreal conference, Attorney General Thornburgh approved a directive that eased the visa restrictions and permitted HIV-infected foreigners to enter the country on temporary visas to attend conferences, for medical treatment, or to conduct business.[133] HIV-infected foreigners, however, would not be allowed as tourists.[134]

The change did not placate activists and public health authorities who continued denouncing the restrictions against HIV-infected foreigners. In December 1989, the National Commission on AIDS, which was organized by a congressional mandate to oversee a national policy on AIDS,[135] called on the Bush administration to end the "unjustified" practices of questioning visa applicants as to whether they were HIV-infected and stamping passports of HIV-infected foreigners who were granted waivers.[136] According to the Commission, the former practice unfairly discriminates against foreigners who know they are HIV-infected because many who may be ignorant of their infection could enter the country without question.[137] The latter practice, states the Commission, is an invasion of privacy since the presence of the code draws obvious attention to those who are HIV-infected and risks stigmatizing them.[138] "There is no public health justification for current policies, they fly in the face of strong international opinion and practice, they lead to unconscionable

131. *Id.*

132. Boodman, *Foreigners with AIDS to Be Permitted Limited Entry to U.S.*, Wash. Post, May 19, 1989, at A20, col. 1.

133. Johnston, *supra* note 121, at D16, col. 1.

134. *Id.*

135. The commission consists of ten members appointed by Congress and two by the President.

136. Cimons, *AIDS Panel Calls for End to Stigmatizing Foreign Visitors Who Are HIV-Infected*, L.A. Times, Dec. 13, 1989, at A4, col. 1.

137. Specter, *supra* note 128, at A2, col. 1.

138. Cimins, *supra* note 136, at A4, col. 1.

infringement of human rights and dignity," said Dr. June E. Osborn, chairwoman of the commission.[139] She further stated that the restrictions on HIV-infected foreigners "reinforce a false impression that AIDS and HIV are a general threat when in fact they are sharply restricted in their mode of transmission."[140] Representatives from the commission and from the HHS' Centers for Disease Control (CDC), were asked by Dr. James O. Mason, HHS Assistant Secretary, to meet with officials from the Justice and State Departments to workout a policy that would take into consideration these concerns.[141]

The mounting opposition to the United States policy threatened attendance at the Sixth International Conference on AIDS in San Francisco in June 1990, as sponsors predicted that as many as one-third of the expected 12,000 participants would boycott the meeting.[142] In January, the government eased the passport policy by allowing a foreigner to complete the declaration of medical condition in confidence and eliminating the use of the stamped code in favor of a separate sheet of paper with a waiver stamp on it.[143] The government's critics, like Dr. Osborn, were not satisfied, saying that the change did not go far enough in guaranteeing confidentiality.[144]

In April, bowing to unrelenting international pressure, the INS announced that it would issue a special no-questions-asked 10-day visa for foreigners wishing to enter the country to attend a medical meeting or conference as designated by HHS.[145] The measure was an attempt to avoid a widespread boycott and demonstration of the San Francisco conference and ease international embarrassment and condemnation.[146] Opponents of the new short-term visa were still unappeased and made good on their threats of protest.[147]

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139. Mallin, *AIDS Rule for Visits, Emigration Criticized*, Wash. Times, Dec. 13, 1989, at A3, col. 1.

140. *Id.*

141. Cimins, *supra* note 136, at A4, col. 1.

142. *Id.*

143. Hilts, *supra* note 109, at B6, col. 1.

144. *Id.*

145. Leary, *Visa Rules Eased for Foreigners with AIDS*, N.Y. Times, Apr. 15, 1990, at A7, col. 1.

146. *Id.*

147. Gross, *Immigration Laws Protested on Eve of AIDS Conference*, N.Y. Times, June 20, 1990, at A15, col. 1; Gross, *Protest, Not Poignancy, Marks AIDS Gathering*, N.Y. Times, June 21, 1990, at B5, col. 3. The protesting was so loud that it drowned out Dr. Louis W. Sullivan,

C. *Toward Expunging HIV from the List: The Sullivan Proposal*

In February 1990, in response to a request by Dr. Mason to review the list, CDC recommended that HIV and all other contagious diseases except tuberculosis be removed from the list.[148] CDC determined that only tuberculosis, which can be spread through casual contact, posed a public health threat because in its active stage it is highly contagious until treated.[149] In April, several members of Congress, including Representatives Henry A. Waxman, Democrat of California, and J. Roy Howland, Democrat of Georgia, introduced legislation to give HHS sole authority to decide what diseases threaten public health and belong on the list excluding aliens from entry into the country.[150]

In May, Representatives Waxman and Howland disclosed a report by the Acting Comptroller General Milton J. Socolar, the legal advisor to Congress, that the Bush administration had legal authority to drop the immigration restrictions.[151] Mr. Socolar said that the Helms amendment was effective only in 1987 and had expired.[152] He also said the Secretary of HHS had the right to decide that a disease no longer meets statutory criteria.[153]

In November, Congress, acting on an amendment sponsored by Representative Howland, passed the Immigration Act of 1990, which redefined the grounds for exclusion.[154] The legislation effectively killed the Helms amendment and granted the HHS Secretary the power to redraw the disease list based on new grounds.[155] Instead of being excluded for being "afflicted with any dangerous contagious disease,"[156]

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the HHS Secretary, when he tried to address the meeting. Steinbrook, *AIDS Conference Ends on Note of Confidence; But Participants Are Reminded That the Worldwide Epidemic Remains Out of Control*, L.A. Times, June 25, 1990, at A1, col. 2.

148. Hilts, *Agency Says AIDS Should Not Bar Entry to U.S.*, N.Y. Times, Feb. 27, 1990, at A18, col. 1.

149. *Id.*

150. Leary, *supra* note 145, at A7, col. 1.

151. *President Told He Can Lift AIDS Travel Ban*, N.Y. Times, May 23, 1990, at A22, col. 1.

152. *Id.*

153. *Id.*

154. 8 U.S.C. § 1182(a) (1988), *as amended by* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

155. 8 U.S.C. § 1182(a) (1988), *as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(1)(A)(i), 104 Stat. 4978, 5067 (1990).

156. 8 U.S.C. § 1182(a)(6) (1988).

aliens would be excluded for having "a communicable disease of public health significance."[157] The provision was to take effect on June 1, 1990.[158]

In January 1991, Dr. Louis W. Sullivan, the HHS Secretary, acceded to the recommendations of CDC and proposed to the State and Justice Departments that all diseases, including HIV, be removed from the list of diseases, except tuberculosis.[159] "Allowing HIV-infected aliens into the country will not impose a significant additional risk of HIV infection to the U.S. population," said Dr. Sullivan in a notice published in the Federal Register for public comment.[160] He noted that AIDS is not spread through casual contact, air, food, or water.[161]

D. Putting HIV Back on the List: The Bush Administration Shelves the Sullivan Proposal

On May 25, 1991, one week before the new list was to take effect, the Justice Department tabled Dr. Sullivan's proposal to eliminate HIV from the conditions barring entry into the country.[162] The government received some 40,000 comments voicing opposition to the proposal, many contending that if HIV-infected persons were permitted to immigrate, the medical system would be overwhelmed with their care—the cost for which would fall on taxpayers.[163] Letters also voiced concern that the proposal would expose the country to public health risks.[164] The Justice Department also admitted that it questioned whether Dr. Sullivan adequately documented his conclusion that AIDS is not a "contagious disease of public health significance."[165]

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157. 8 U.S.C. § 1182(a) (1988), *as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(1)(A)(i), 104 Stat. 4978, 5067 (1990).

158. Immigration Act of 1990, Pub. L. No. 101-649, § 601(e), 104 Stat. 4978, 5077 (1990).

159. 56 Fed. Reg. 2484 (1991) (to be codified at 42 C.F.R. pt. 34) (proposed Jan 23, 1991).

160. *Id.*

161. *Id.*

162. DeWitt, *supra* note 17, at A1, col. 1.

163. *Id.* Under the United States immigration laws, persons can be barred if it appears that they are likely at any time to become a "public charge" because of the high cost of their medical care. 8 U.S.C. § 1182(a)(15), *as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(4), 104 Stat. 4978, 5072 (1990).

164. DeWitt, *supra* note 17, at A1, col. 1. An HHS official said that many of the opposing letters making this argument appeared to have been influenced by an evangelical broadcaster. *Id.*

165. Pear, *supra* note 19, at A18, col. 1. It was also reported that "bureaucratic pique" had

Not surprisingly, the latest United States backpedaling came under sharp criticism at the Seventh International Conference on AIDS in Florence, further blackening the American eye in the international health arena.[166] The Bush administration has responded by announcing its intention to allow HIV-infected foreigners to enter the country provided they do not seek permanent residence.[167] HIV-infected persons would be excluded solely because of cost considerations and not because of their disease.[168] As of August 1991, the policy was undrafted.[169] In the wake of the furor over the United States policy, sponsors of the Eighth International Conference on AIDS, originally to be held in June 1992 in Boston, announced they would relocate the meeting outside the country, in Amsterdam.[170]

V. CONCLUSION

In resisting the entreaties of WHO and the international health community to lift its travel restrictions on HIV-infected aliens, the United States government has altered its justification over time. Initially, in 1987, when the Helms amendment was passed, the Reagan administration's official position was that HIV was added to the list of diseases barring entry into the country because the government feared its spread. By 1991, when the Bush administration scotched Dr. Sullivan's proposal to remove HIV from the list, the government said it feared that infected immigrants would saddle the health care system and the taxpayers who fund it. According to the government's critics, WHO among them, both rationales are more pretextual than plausible.

Admitting HIV-infected foreigners into the country will not, as many fear, contaminate the populace for two chief reasons. First, HIV is simply not contagious. Second, the United States is running a huge AIDS surplus with the rest of the world. The ratio of HIV-infected Americans to would-be immigrants who are infected is staggering—there are believed

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a role in the Justice Department's move, as Dr. Sullivan failed to consent with the its officials when making his determination. *Id.*

166. Altman, *U.S. Ban on Infected Travellers Attacked at World AIDS Conference*, N.Y. Times, June 17, 1991, at A13, col. 3.

167. Hilts, *U.S. to Admit Some Immigrants with AIDS Under New Health Policy*, N.Y. Times, Aug. 3, 1991, at A7, col. 2.

168. *Id.*

169. *Id.*

170. Altman, *Amsterdam Picked for AIDS Meeting*, N.Y. Times, Sept. 12, 1991, at B11, col. 1.

to be one million HIV-infected persons in this country, but only 600 HIV-infected immigrants would be admitted annually under Dr. Sullivan's proposal.[171] Because the United States exports so much more HIV than it imports, its stance that the virus comes from somewhere beyond its borders is not only folly, but bespeaks dubious undercurrents.

As for the cost of caring for HIV-infected immigrants, health experts say it is impossible to estimate such an economic impact.[172] As a recent editorial pointed out, however, "if cost is the issue, then the U.S. would ban all foreigners with kidney disease, cancer or other costly ailments."[173]

Since 1987, the United States policy has contravened WHO's call to protect the human rights and dignity of AIDS sufferers, and to avoid discrimination and stigmatization in the areas of international travel and immigration. Because it bears no rational relation to the control and prevention of AIDS, the policy seems to lay bare the ignorance, prejudice, and xenophobia of lawmakers who quixotically believe that public health can only be preserved by battening down the hatches at the borders.[174] Such a measure not only intrudes on the human rights of AIDS sufferers, but also fuels the public panic, which leads to irrational and insensitive treatment of the victims by other members of society. This discrimination can only be diminished through public information and education. Governments, however, must lead the way by making informed and educated policies.

WHO does not have the means to enforce its resolutions in order to ensure compliance by its member nations. It only reminds governments that public health ought to be protected with the fewest possible infringements of liberty, privacy, and confidentiality. Indeed, WHO has made overtures—namely, in twice pressuring the United States government to ease its visa restrictions for short-term visitors who are HIV-infected. More cooperation, however, is needed from WHO's 166 member nations, including the United States, before AIDS-related discrimination is no

171. Pear, *supra* note 18, at A23, col. 1. Finding those 600 among the 600,000 permanent residents who are admitted into the United States each year would require costly testing. *This AIDS Ban Invites Ridicule*, N.Y. Times, June 19, 1991, at A16, col. 1 (editorial) [hereinafter *This AIDS Ban*]. In 1989, one out of every 1,000 applicants tested for HIV were found to be infected, resulting in the denial of about 420 would-be immigrants. Pear, *supra* note 18, at A23, col. 1.

172. De Witt, *supra* note 17, at A1, col. 1.

173. *This AIDS Ban*, *supra* note 171, at A16, col. 1.

174. As Hans Paul Verhoef put it, trying to stop AIDS at national borders "is like trying to stop water with a net." Zonona, *supra* note 120, at 3, col. 5.

longer tolerated by society and a chance exists to control and prevent the disease. Such cooperation requires that these nations accept the premise that public health needs, even those arising from the AIDS pandemic, "do not provide a blanket exemption from observance of human rights obligations."[175] "The fight against the disease should not amount to a fight against the people infected with the disease."[176]

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175. GCA Report, *supra* note 29, at 5.

176. Tomaševski, *supra* note 8, at 177.